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ADHESION CONTRACTS: A TWENTIETH CENTURY PROBLEM FOR A NINETEENTH CENTURY CODE*

Nora K. Duncan**

INTRODUCTION

In recent years, legal scholars have begun to recognize that traditional principles of contractual interpretation based on the underlying notions of equality of bargaining power and party autonomy are inadequate to deal with a large number of modern commercial contracts.¹ These anomolous contracts are called contracts of adhesion² and are characterized by a lack of bargaining power in one of the parties to the agreement and by the fact that they are written entirely by one party and offered on a "take it or leave it" basis to the other.³ Adhesion contracts are a byproduct of the growth of big business into monopolistic enterprises focusing on mass distribution and mass sales in the most effective way possible.⁴ The contracts are drafted and presented to the public rather than to individuals. Thus, the drafter may write the contract to his best advantage and the adhering party has no chance to bargain.⁵ If the enterprise offering the contract has little or no competition in the field or if the location of the buyer does not present the opportunity for comparative shopping, there may in fact be no choice at all for the buyer.⁶ Although

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1. Contracts of adhesion was the topic of a colloquium at the Eighth International Congress of Comparative Law at Pescara in September 1970. Several items cited in this article are based on reports at that conference.

2. The term "contract of adhesion" was first coined by the French civilian Raymond Saleilles in *DE LA DÉCLARATION DE VOLONTÉ* 229 (1901), a discussion of party autonomy under the German Civil Code.

3. Although adhesion contracts are usually standard form contracts, the two should be distinguished. Not all standard form contracts are contracts of adhesion since in some cases the parties may add special clauses or alter the form. See Bolgár, *The Contract of Adhesion—A Comparison of Theory and Practice*, 20 AM. J. COMP. L. 53, 54 n.2 (1972) [hereinafter cited as *Bolgár*]; Wilson, *Freedom of Contract and Adhesion Contracts*, 14 INTERNATIONAL & COMPARATIVE L.Q. 172, 175-76 (1965) [hereinafter cited as *Wilson*].

4. Lenhoff, *Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law*, 36 TUL. L. REV. 481 (1962) [hereinafter cited as *Lenhoff*].

5. *Bolgár* at 57.

6. *Lenhoff* at 482. Even if the buyer has the opportunity to do comparative shopping if all suppliers of one item use the same form, he may have no effective choice.

the problem of adhesion contracts is not a new one to the courts,⁷ the use of such contracts has greatly multiplied in the twentieth century.

The problem in interpreting these contracts and in determining the rights of the parties is due to a conflict between two fundamental principles basic to our law. One is the idea of party autonomy,⁸ and the other is that the purpose of the courts is to dispense justice.⁹ If there has in fact been no bargaining, how can the courts apply principles of contract based on a conception of bargaining and free will of the parties? Will the courts be "doing justice" if they enforce a clause in an agreement which is unconscionably prejudicial to the weaker party?

The dilemma presented by adhesion contracts needs to be carefully analyzed. This article will explore some of the problems and possibilities in dealing with adhesion contracts and suggest possible judicial and legislative approaches to equalize the bargaining position of the parties.

I. JUDICIAL APPROACHES TO ADHESION CONTRACTS¹⁰

Civilian Jurisdictions

In the absence of legislative provisions dealing with adhesion contracts, the courts in civilian jurisdictions have relied on three principles of law: *contra bonos mores*, good faith, and equity.¹¹

The courts in Germany have struck down contracts containing disclaimers of liability and other harsh clauses on the theory of *contra bonos mores*.¹² To justify the refusal to enforce onerous conditions of a contract, the courts in France and the Netherlands¹³ use a codal article that requires that contracts be performed in good faith.¹⁴ Civil-

7. Frequently cited cases which discuss the inequality in bargaining power of the parties are *Earl of Chesterfield v. Janssen*, 2 Ves. Sen. 125, # 28, Eng. Rep. 82 (1750), and *N.Y. Cent. R.R. v. Lockwood*, 84 U.S. (17 Wall.) 357 (1873).

8. *Bolgár* at 53.

9. *Id.* at 58.

10. The following discussion is intended merely to illustrate trends in judicial interpretation rather than to fully examine the details of the multifarious judicial doctrines and rules of construction which may have related to contracts of adhesion.

11. Not all courts in civilian jurisdictions have the same authority to interpret the codes or dispense justice along the broad lines of equity. However, this article will not examine that problem. See *Bolgár* at 65 for a discussion of these limitations.

12. *Bolgár* at 60. This theory has also been used by courts of the Netherlands. Hondius, *Standard Contracts and Adhesion Contracts According to Dutch Law*, 8TH INTL. CONGRESS OF COMPARATIVE LAW, PESCARA 119 (1970) [hereinafter cited as *Hondius*].

13. *Wilson* at 179; *Hondius* at 122.

14. FRENCH CIV. CODE art. 1134: "Les conventions légalement formées tiennent

ian application of equity varies from jurisdiction to jurisdiction;¹⁵ however, the German and Dutch Courts have the authority to apply principles of equity under the provisions of good faith or *contra bonos mores*, and the courts of Switzerland have the duty to act as legislators in the absence of statutory provisions.

Common Law Jurisdictions

In the United States, early cases dealing with contracts containing disclaimer of liability clauses show that the courts first invalidated such clauses in cases of gross negligence. Later, the courts used traditional theories to strike down the clauses on the basis of absence of knowledge, absence of consent, fundamental breach or breach of the fundamental term,¹⁶ inequity,¹⁷ or unconscionability.¹⁸ Of these, the theory of unconscionability was a frequently used reason for invalidating harsh contractual provisions.¹⁹

The extent to which the unconscionability concept was accepted as an aid to interpretation of adhesion contracts can be illustrated by the case of *Williams v. Walker-Thomas Furniture Co.*²⁰ Although Congress had enacted the new unconscionability provision of the Uniform Commercial Code²¹ for the District of Columbia, the contract in question had been completed before the enactment, so the UCC did

lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi."

15. The civilian term equity is meant here, not the equity of the common law system. For a discussion of the meaning of equity in the civil law, see Razi, *Reflections on Equity in the Civil Law Systems*, 13 AM. U.L. REV. 24 (1963).

16. *Wilson* at 177.

17. "Inequity" here includes the doctrine of intrinsic fraud. See *Williams v. Walker-Thomas Furn. Co.*, 350 F.2d 445, 449 n.7 (D.C. Cir. 1965).

18. *Bolgár* at 59.

19. See, e.g., Annot., 18 A.L.R.3d 1305 (1968).

20. 350 F.2d 445 (D.C. Cir. 1965). In *Williams*, the defendant sold to plaintiff a number of household items from 1957 to 1962. Each transaction had a separate contract which purported to be a lease until the value had been paid in monthly installments, after which ownership would pass to the buyer. Each contract stipulated that the amount of payment made under one "lease" was inclusive of and not in addition to other payments which might be owed by the buyer to the seller in other "lease" agreements. It further stipulated "all payments now and hereafter made by [purchaser] shall be credited pro rata on all outstanding leases, bills and accounts." In 1962 plaintiff bought a stereo valued at \$514.95 and soon defaulted. Defendant sought to replevy all items sold to plaintiff since 1957 under the terms of the contract. At the time of the last purchase, plaintiff owed \$164 on previous purchases. The value of the things purchased since 1957 was \$1,800 of which plaintiff had paid \$1,400.

21. UNIFORM COMMERCIAL CODE § 2-302, quoted in text at note 58 *infra*.

not apply. Nevertheless, the court interpreted the contract in the light of its unconscionability saying that:

The enactment of this section, which occurred subsequent to the contracts here in suit, does not mean that the common law of the District of Columbia was otherwise at the time of the enactment, nor does it preclude the court from adopting a similar rule in the exercise of its powers to develop the common law for the District of Columbia.²²

It should be noted that in both civilian and common law jurisdictions, the courts have used special rules of construction to aid in the interpretation of adhesion contracts.²³ Thus, clauses written solely by the offeror are strictly construed against him. Further, clauses will not be enforced when the document does not appear to be a contract in nature,²⁴ when conditions written in fine print were not brought to the attention of the adhering party,²⁵ and when the conditions were not specified until after the agreement was entered into.²⁶ It is submitted that the methods used by the courts in both civilian and common law jurisdictions which have been cited above fail to deal adequately with the fundamental issue of consent in adhesion contracts.

Louisiana Judicial Interpretations

It is difficult to find cases dealing with adhesion contracts in Louisiana. Thorough research has revealed no cases which discuss the problems of adhesion *per se* or which follow the common law analysis of unconscionability.²⁷ Cases turning on the issue of consent are devoid of any discussion of the elements of adhesion for the most part. Nevertheless, there are a number of cases which deal with adhesion indirectly or which appear to consider the inequities of one-sided contracts.

In the case of *Lawes v. New Orleans Transfer Co.*²⁸ the Louisiana court followed the general trend toward distinguishing printed dis-

22. *Williams v. Walker-Thomas Furn. Co.*, 350 F.2d 445, 448 (D.C. Cir. 1965).

23. *Hondius* at 119; *Wilson* at 177.

24. 10 C.J. Carriers § 179 (1917); Annot., 26 A.L.R. 1375 (1923).

25. See Comment, 63 HARV. L. REV. 495 (1950).

26. *Wilson* at 177.

27. See *Williams v. Walker-Thomas Furn. Co.*, 350 F.2d 445 (D.C. Cir. 1965); *Campbell Soups Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1949); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

28. 123 So. 144 (La. App. Orl. Cir. 1929). See also *Marine Ins. Co. Ltd. of London England v. Rehm*, 177 So. 79 (La. App. Orl. Cir. 1937).

claimers on the back of claim checks from contracts. However, the issue in those cases turns on whether or not a contract could be said to have been entered into. There is no discussion of the nature of the consent or of the relative bargaining position of the parties. That this is a consideration can be inferred from the language used in *Zimmer v. N.Y. Cent. & H.R.R. Co.*²⁹ which was cited in the *Lawes* case:

The difference [between acceptance of baggage or freight receipts] is very obvious in the circumstances, which, in the one case usually admit of no negotiation, or discussion; while, in the other, the shipment of the property is a matter of arrangement with full opportunity for deliberate action.

The distinction between receipts and contracts has also been used in regard to rent receipts.³⁰

On the other hand, there is an entire line of cases supporting the proposition that consent is presumed by a signature on the contract, and the obligations contained therein cannot be avoided by the allegation that the terms were not read or understood before the signing.³¹ Typical of the language used in these cases is the following excerpt from *Ideal Loan of New Orleans, Inc. v. Johnson*:³²

[I]t is well established that one who signs a written instrument or places his mark therein, is presumed to know its contents; and he cannot avoid its obligations merely by contending that he had not read it, or that it was not read and explained to him, or that he did not understand its provisions.

This "presumption" is carried to such an extent, that it applies even to persons who are illiterate,³³ or who do not understand the language in which the contract is written.³⁴ In addition, there are many cases which hold that a contract is the agreement between the parties, and the courts cannot relieve a party from a bad bargain, no matter how

29. 137 N.Y. 460, 33 N.E. 642 (1893).

30. *Roppolo v. Pick*, 4 So. 2d 839 (La. App. Orl. Cir. 1942).

31. See, e.g., *Hope v. Barham*, 28 F. Supp. 561 (W.D. La. 1939); *Commercial Credit Corp. v. Shipp*, 220 So. 2d 735 (La. App. 2d Cir.), *writs refused*, 254 La. 132, 222 So. 2d 883 (1969); *Ideal Loan of N.O., Inc., v. Johnson*, 218 So. 2d 634 (La. App. 4th Cir. 1969); *St. Landry Loan Co. v. Avie*, 147 So. 2d 725 (La. App. 3d Cir. 1962); *Blades v. Southern Farm Bur. Cas. Co., Inc.*, 95 So. 2d 209 (La. App. 1st Cir. 1957), *reversed on other ground*, 237 La. 1, 110 So. 2d 116 (1959).

32. 218 So. 2d 634, 635 (La. App. 4th Cir. 1969).

33. *Jackson v. Lemle*, 35 La. Ann. 855 (1883); *Housecraft Div. of So. Siding Co. v. Jones*, 120 So. 2d 662 (La. App. Orl. Cir. 1960).

34. *Boagni v. Fouchey*, 26 La. Ann. 594 (1874); *St. Landry Loan Co., Inc. v. Avie*, 147 So. 2d 725 (La. App. 3d Cir. 1962).

harsh.³⁵ In order to avoid the implied consent of a signature, fraud or mistake must be shown.³⁶ Perhaps the reason that there are no cases on the issue of adhesion is that litigants are simply not pressing the consent issue and fraud is extremely difficult to prove.³⁷

Recently, there have been a few cases in Louisiana which indicate that the problem of adhesion is not completely unknown to the courts. In *Commercial Credit Corp. v. Dowdy*³⁸ the court mentioned that the contract in question which the plaintiff was trying to enforce was a printed form prepared entirely by the plaintiff for the defendant's signature. In that case, although the court followed the presumption that the parties knew and understood the meaning of the contract, it said:

Appellants have made no claim of fraud or deception, and there is nothing in the record to indicate that they did not fully understand the nature of their obligation to plaintiff.³⁹

The question which arises is whether it would have made a difference if there was evidence in the record to indicate that the parties did not understand the meaning of the contract.

In *Servisco v. Morreale*⁴⁰ the Louisiana federal district court dealt with the problem of a form contract signed in blank. In that case, an employer was suing for an injunction and damages due to a former employee's soliciting the business of his ex-employer.⁴¹ During the course of the employment, the employer had sent the employee a blank form containing an agreement "by _____ residing at _____ hereinafter designated as employee" not to solicit the customers of the employer for one year after the termination of employment. The agreement had been written by the employer; the employee had signed it without filling in the blanks (which were subsequently filled in by the employer); and there was no evidence that he read it or that it was read to him. In discussing the effect of the signature, the court said:

35. See, e.g., *Maloney v. Oak Builders, Inc.*, 256 La. 85, 235 So. 2d 386 (1970); *J.H. Jenkins Cont., Inc. v. City of Denham Springs*, 216 So. 2d 549 (La. App. 1st Cir. 1968); *Succession of Caine v. Tanno Land & Cattle Co.*, 198 So. 2d 439 (La. App. 4th Cir. 1967); *Leon v. Dupre*, 144 So. 2d 667 (La. App. 4th Cir. 1962).

36. See, e.g., *Hinterlang v. Usner*, 215 La. 626, 41 So. 2d 455 (1949); *Chemical Cleaning, Inc. v. Brindell-Bruno, Inc.*, 214 So. 2d 215 (La. App. 4th Cir. 1968).

37. An example of the difficulty of proving fraud is *St. Landry Loan Co., Inc. v. Avie*, 147 So. 2d 725 (La. App. 3d Cir. 1962).

38. 180 So. 2d 826 (La. App. 4th Cir. 1965).

39. *Id.* at 828.

40. 312 F. Supp. 103 (E.D. La. 1970).

41. LA. R.S. 23:921 (1950), as amended by La. Acts 1962. No. 104, §§ 1, 2 did not apply.

Morreale has limited education. The preponderance of the evidence indicates that he never understood the paper he signed, and that it was never explained to him. In this action the court's equity power has been enlisted in an attempt to obtain a writ of injunction. Under the circumstances it would be both inequitable and adverse to Louisiana's policy favoring free competition to enforce the contract's conditions against Morreale.⁴²

Although a federal court applying equity powers is in a different position than a state court in Louisiana, the considerations used here might well be applied in accordance with the Louisiana Civil Code to support a *contra bonos mores* argument similar to that applied in other civilian jurisdictions.⁴³

It is difficult to determine which (if any) theory Louisiana courts might use in facing directly the problems of adhesion. There are insurance cases which stand for the proposition that written clauses control clauses printed on the form contract, but even that equitable principle is limited to a situation in which the written and the printed parts are completely irreconcilable.⁴⁴ Without a judicial interpretation of Louisiana Civil Code article 1901, par. 3 requiring good faith to be used in the *making* of a contract, that article would not be applicable.⁴⁵ There are some cases stating that courts will not enforce a contract which is against public policy, but public policy in that sense has to be very well defined (usually in a statute).⁴⁶ Since Louisiana has not adopted the Uniform Commercial Code, there are no cases applying the unconscionability clause.

42. 312 F. Supp. 103, 105 (E.D. La. 1970).

43. Such a result would be reached under Louisiana Civil Code article 1892: "That is considered as morally impossible, which is forbidden by law, or contrary to morals. All contracts having such an object are void." See also Succession of Molaison, 213 La. 378, 34 So. 2d 897 (1948), in which a *notarial act* of renunciation of legitime was annulled on the basis that the forced heir did not have sufficient experience or mental capacity to understand the meaning of the act. Although the notary did not explain the consequences of the act to the heir, there was no proof of fraud.

44. See, e.g., Cotton Brothers Cypress Co. v. Home, 147 La. 308, 84 So. 792 (1920); Wallace v. Insurance Co., 4 La. 289 (1832); Brooke v. Louisiana St. Ins. Co., 4 Mart.(N.S.) 640 (La. 1826).

45. LA. CIV. CODE art. 1901: "Agreements . . . must be performed with good faith." (Emphasis added.)

46. See Southwest Sugar & Molasses Co. v. River Term. Corp., 360 U.S. 411 (1959); Palmer v. Chamberlin, 191 F.2d 532 (5th Cir. 1951); Theater Time Clock, Inc. v. Stewart, 276 F. Supp. 593 (E.D. La. 1967); Meinerz v. Traybig, 245 So. 2d 557 (La. App. 3d Cir. 1971).

II. LEGISLATIVE APPROACHES TO ADHESION CONTRACTS⁴⁷*Italy*

Instead of facing the problem of adhesion contracts through judicial interpretation, the Italian Civil Code of 1942 has specific code articles relating to standard conditions and one-sided clauses. The principle articles are as follows:

Article 1341-General [Standard] Conditions

General conditions, prepared by one of the parties, are binding on the other party [are incorporated into the contract] if known by the latter at the time when the contract was concluded or if he might have known by using ordinary diligence.

The following conditions, however, have no effect [are not incorporated] unless specifically approved in writing:

1. Conditions limiting the liability of the party who has prepared the general conditions, or giving said party a power to withdraw from the contract or to suspend the execution thereof.

2. Conditions burdening the other party with time limits for the exercise of a right or limitations to such party's power to raise defenses, or with restrictions on freedom of contract with third persons, or with tacit extension or renewal of the contract.

3. Clauses providing for arbitration or derogations from the normal venue or jurisdiction of the courts.⁴⁸

Article 1342-Form Contracts

In contracts made by subscribing to forms prepared for the purpose of regulating in a uniform manner certain contractual relationships, the clauses added to such forms prevail over the original formulary clauses, even if incompatible, and even though the latter have not been stricken out.

In addition, the provision of the second paragraph of the

47. The legislative enactments of Italy are provided as an example of the legislative approach of a civil law jurisdiction. No attempt has been made to find all possible legislation affecting adhesion contracts.

48. Civ. art. 1341 (Laporta, Tamburrino 1963): "Le condizioni generali di contratto predisposte da uno dei contraenti sono efficaci nei confronti dell'altro, se al momento della conclusione del contratto questi le ha conosciute o avrebbe dovuto conoscerle usando l'ordinaria diligenza.

"Il caso non ha effetto, se non sono specificamente approvate per iscritto, le condizioni che stabiliscono, a favore di colui che le ha predisposte, limitazioni di responsabilità, facoltà di recedere dal contratto o di sospenderne l'esecuzione, zioni alla facoltà di opporre eccezioni, restrizioni alla libertà contrattuale nei rapporti coi terzi, tacita proroga o rinnovazione del contratto, clausole compromissorie o deroghe alla competenza dell'autorità giudiziaria."

preceding article is applicable.⁴⁹

In 1962 Professor Gino Gorla of the University of Rome, Italy, wrote an article analyzing the judicial interpretations of these articles in the twenty years since their adoption and the problems involved.⁵⁰ The following discussion is adapted from that article in an attempt to point out the advantages and disadvantages of such a legislative innovation.

It should first be noted that the Italian Code distinguishes the problems of standard conditions from one-sided clauses. Each of these problems will be discussed separately.

The first paragraph of article 1341 indicates that the party using the standard conditions has the burden of proof to show such facts as notice, publicity, or that the circumstances show that a person of ordinary diligence should have known of the conditions. In this regard, general practices of the trade can be shown to indicate that the standard conditions should have been known.⁵¹ This paragraph specifically does not apply to one-sided clauses which are covered by the second paragraph of article 1341 and must be specifically approved in writing even if they are the general practice of the trade. The burden of diligence on the adhering party was explained by Professor Gorla in four basic fact situations.⁵²

1. Standard conditions (not one-sided clauses) are in the contract and the adhering party has the duty to read them; if he does not read them they are still binding upon him, even if written in fine print.
2. Reference to standard conditions is clearly and expressly in the contract although the conditions themselves are on the back or in the margin of the contract not covered by the signature. The Italian Court of Cassation has held that the duty on the adhering party is the same as in number one above.
3. The contract contains reference to standard conditions contained elsewhere than on the paper itself. No case holdings had expressly covered this point but dicta seemed to indicate that the adhering party would have the same burden of diligence to find and read the conditions.

49. C. CIV. ART. 1342 (Laporta, Tamburrino 1963): "Nel contratti conclusi mediante la sottoscrizione di moduli o formulari, predisposti per disciplinare in maniera uniforme determinati rapporti contrattuali, le clausole aggiunte al modulo o al formulario prevalgono su quelle del modulo o del formulario qualora siano incompatibili con esse, anche se queste ultime non sono state cancellate. Si osserva inoltre la disposizione del secondo comma dell'articolo precedente."

50. Gorla, *Standard Conditions and Form Contracts in Italian Law*, 11 AM. J. COMP. L. 1 (1962).

51. *Id.* at 4.

52. *Id.* at 5.

4. In transactions speedily entered into at a store or a counter, if there are no one-sided clauses the adhering party is still bound to the conditions though by definition he may have had no time to read them. In all of the above situations, exceptions are made for misrepresentation and deceit. If standard conditions are such that they could not come to the knowledge of the adhering party before the contract was entered into, the adhering party is not bound by them unless he expressly or tacitly accepts the conditions.⁵³

In regard to one-sided clauses there arose much litigation on what was a one-sided clause, and whether the list given in article 1341 was indicative or exclusive. Although the Italian court has refused to interpret these provisions by way of analogy, they have used "extensive interpretation" to include a few situations which do not expressly fall under the listed clauses.⁵⁴ In the determination of the applicability of the nullity of the second paragraph of article 1341, Italian courts treat the question as one of law and do not inspect the particular facts involved such as the relative bargaining position of the parties. The requirement of "specific approval in writing" has been interpreted to mean that the one-sided clauses must be specifically recalled and approved by a separate signature from the signature for the contract as a whole, even if the clauses are in large print in the contract.⁵⁵ This is a strict requirement of form and is true even if the adhering party had full knowledge of the clauses.⁵⁶ This requirement is not extended to one-sided clauses which are introduced after the making of the contract, for example a one-sided clause contained in an invoice. In that situation, the adhering party may enforce the contract in its original form, but if he accepts the new condition by performing in accordance with it, he is considered to have modified the contract and there is no requirement for a special signature.⁵⁷

The disadvantages of these articles pointed out by Professor Gorla fall into two general categories. Since the legislation is specific,

53. *Id.* at 9.

54. *Id.* at 9-10. Clauses which have been held to fall within the scope of article 1341 ¶ 2 include: (1) "clauses imposing the risk of impossibility of performance on the other party, so that the latter has to pay for performance even if he does not receive it"; (2) "clauses which make the customer's offer irrevocable at the moment when he signs an order subject to the approval of the offeree's home office, irrevocability in the civil law requiring no consideration"; (3) "clauses in contracts for the sale of new cars preventing resale within a certain period of time." Additionally, prevailing opinion includes one-sided tacit extension or renewal clauses in leases.

55. Gorla, *Standard Conditions and Form Contracts in Italian Law*, 11 AM. J. COMP. L. 1, 12 (1962).

56. *Id.* at 14.

57. *Id.* at 17.

it has led to a great deal of litigation concerning the problems of the formal requirements. In addition, the courts' inconsistency in strictly interpreting the requirement of specific approval in writing, while extending the article to include cases not directly covered by express language, has led to confusion and uncertainty.⁵⁸

United States

The Uniform Commercial Code provided the first legislative aid to the problem of adhesion contracts in §2-302 in the chapter on sales:

Unconscionable Contract or Clause⁵⁹

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

The official comment under this section sheds light on the intent and interpretation of the unconscionability clause:⁶⁰

The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. *The principle is one of the prevention of oppression and unfair surprise (cf. Campbell Soup Co. v. Wentz, 172 F.2d 80, 3d Cir. 1948) and not of disturbance of allocation of risks because of superior bargaining power.*⁶¹

It should be noted that this provision applies to commercial transactions, where both the parties involved are engaged in commercial enterprises; thus the restriction on one-sided clauses applies primarily to avoid commercial oppression. This section has prompted an

58. *Id.* at 20.

59. UNIFORM COMMERCIAL CODE § 2-302.

60. *Id.*, comment 1.

61. (Emphasis added.)

extensive number of law review articles both praising and criticizing it.⁶² However, the overall response to the provision has been enthusiastic since it is a specific statute on which the courts can rely in reaching equitable results.

Due to the success of the UCC provision, it was used to form a basis for the unconscionability article of the Uniform Consumer Credit Code § 5.108:

(1) With respect to a consumer credit sale, consumer lease, or consumer loan, if the court as a matter of law finds the agreement or any clause of the agreement to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, or it may enforce the remainder of the agreement without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) If it is claimed or appears to the court that the agreement or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making the determination.

(3) For the purpose of this section, a charge or practice expressly permitted by this Act is not in itself unconscionable.⁶³

The official comment points out the difference between this provision and that of the UCC:

The omission of the adjective "commercial" from the provision in subsection (2) concerning the presentation of evidence as to the contract's "setting, purpose, and effect" is deliberate. Unlike the UCC, this section is concerned only with transactions involving consumers, and the relevant standard of conduct for purposes of this section is not that which might be acceptable as between knowledgeable merchants but rather that which measures acceptable conduct on the part of a businessman toward a consumer.⁶⁴

62. Of particular interest is the article by Professor Leff, *Unconscionability and the Code—the Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967), in which he criticizes the term "unconscionable" by saying that it provides no new solution to the problem but like the Emperor's clothes, there is nothing there.

63. See also UNIFORM CONSUMER CREDIT CODE § 4.106 (considerations to be used in determining unconscionability in insurance contracts); *Id.* at § 6.111 (providing for injunctions in cases of unconscionability).

64. *Id.* § 5.108, comment 1.

The test of unconscionability in these consumer transactions is also discussed:

The basic test is whether, in the light of the background and setting of the market, the commercial needs of the particular trade or case, *and the condition of the particular parties to the contract*, the contract or clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. (Emphasis added.)⁶⁵

Thus it appears from this provision and official comment that in the case of consumer transactions the relative bargaining power of the parties is an element in determining unconscionability, contrary to the UCC.

Louisiana

In 1972, the Louisiana legislature adopted a provision on unconscionability in consumer credit transactions based on the UCCC provision. This law became effective on January 1, 1973 and reads as follows:

With respect to a consumer credit transaction, if the court as a matter of law finds the agreement or any clause of the agreement to have been unconscionable at any time it was made the court may refuse to enforce the agreement, or it may enforce the remainder of the agreement without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result; provided, however, for the purposes of this chapter, an agreement, clause, charge or practice expressly permitted by this chapter or any other law or regulation of this state or of the United States or subdivision of either, or an agreement, clause, charge or practice necessarily implied as being permitted by this chapter or any other law or regulation of this state or the United States or any subdivision of either is not unconscionable.⁶⁶

This statute has gone into effect too recently to have any judicial interpretation yet, and the legislative history is practically nonexistent. However, a few points should be noted about the statute. It is presumed that since this statute follows the UCCC provision

65. *Id.*, comment 2. The commentators edited *Williams v. Walker-Thomas Furn. Co.*, 350 F.2d 445 (D.C. Cir. 1965) and *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69 (1960), to show prior applicability of the doctrine.

66. LA. R.S. 9:3551 (Supp. 1972).

§5.108, the test in Louisiana for unconscionability would follow that discussed in the official comment to UCCC §5.108. This presumption is further supported by the tentative draft of the Louisiana Consumer Protection Code.⁶⁷ In the comment to the section on unconscionability, the reporter incorporated the same observation concerning the test as that under UCCC §5.108.⁶⁸

This new statute adds great flexibility to Louisiana law and provides the courts with a lever to help balance the power between the parties. Although the statute is a giant step forward, it does not go far enough. The provision deals with consumer transactions only, and, since Louisiana has not adopted the UCC, there is no similar protection of merchants in a situation such as that discussed in *Campbell Soups Co. v. Wentz*. Furthermore, the real issue of consent is not attacked by this statute. There is still no uniform, logical approach to the problems of adhesion in Louisiana.

III. A SOLUTION TO THE ADHESION DILEMMA

What should be done to ameliorate the problem of adhesion contracts? It seems that the first step would be to recognize them as a special kind of contract to which special rules must apply. In spite of the strong inclination toward recognition of freedom of contract, this result is dictated if the law continues to strive to mete out justice to all persons. It should be recognized

that although liberty and equality before the law are essential to democracy, they have not themselves any necessary connection with economic justice, and may, where there is great economic disparity between individuals, operate as instruments of oppression. Applied to the field of contract this [leads] to the recognition that freedom is only reasonable as a social ideal when equality of bargaining power is assumed.⁶⁹

It is submitted that adhesion contracts may be equitably dealt with upon proper analysis and interpretation of the provisions of the Louisiana Civil Code. In the twentieth century, most of the great social changes which have taken place are exemplified in legislation in the public law areas such as labor law, social legislation, taxation, administrative regulation, and laws affecting public corporations.⁷⁰

67. *Tentative Draft of the Louisiana Consumer Protection Code*, considered at the Meeting of Council, Louisiana State Law Institute (New Orleans, Feb. 11-12, 1972).

68. *Id.* at p. 35.

69. *Wilson* at 174.

70. R. SCHLESINGER, *CASES AND MATERIALS ON COMPARATIVE LAW* 447 (1970).

Private law, governed by the Code, has been scarcely altered by these changes. Although the Louisiana Civil Code⁷¹ is a nineteenth century code patterned on the Code Napoleon, it reflects the basic premises and social values of our society. The fact that the Code was promulgated in the nineteenth century does not diminish the fact that it can grow to meet social changes of the twentieth century.

Codes in the civilian tradition are general statements of the law, statements of broad policy, statements of direction, statements of law which are meant to have a long continuity of existence. In some respects more similar to constitutions than to statutory enactments, civil codes are meant to provide a basic system of law which can acquire new life when necessary in changing time and circumstances.⁷²

If the Civil Code is to meet new challenges, it must be viewed with twentieth century problems in mind. Solutions which were appropriate for nineteenth century society will not necessarily aid in coping with problems which were nonexistent at that time. Former jurisprudence will not provide a basis upon which to determine answers to the new problems presented; however, the fundamental legal norms contained in the Code will. From these norms, a reasoned approach to a new problem can be formulated.

The Nature of Consent

The essential difficulty in adhesion contracts is the notion of consent. Louisiana courts have followed the old French principle *adhérer c'est consentir* and have equated signature with consent. In applying this rule, the courts have stressed the importance of signing anything, saying "signatures to obligations are not mere ornaments."⁷³ In order to understand this jurisprudential rule, it must be considered in the context in which it was developed. In the nineteenth century when many people were illiterate and business was usually conducted in face-to-face transactions, a person might sign his name only twenty times in his entire life. In effect, a signature was only slightly less solemn than a seal on a document. Today, an average person could easily sign his name to various documents having some legal significance twenty times a week. While it is necessary to have a means to determine whether a person intends to be bound to an

71. Hereinafter called the Civil Code or simply, the Code.

72. Barham, *A Renaissance of the Civilian Tradition in Louisiana*, 33 LA. L. REV. 357, 369 (1973).

73. *Boullt v. Sarpy*, 30 La. Ann. 494, 495 (1878).

agreement, a strict construction of signature as implying consent regardless of the surrounding facts and circumstances hardly seems reasonable.

The requirement in the Code is that consent is a necessary prerequisite to a valid agreement.⁷⁴ There is no codal provision specifying that a signature is *prima facie* proof of this consent or that a legal presumption of consent is created by signature. However, the Code does provide that "[t]he contract is not to be confounded with the instrument in writing by which it is witnessed"⁷⁵

If there are one-sided clauses in a form contract to which a person in his right mind would not normally consent, is it valid to presume that his signature implies consent to every element of the agreement? Does the presumption retain validity when it is shown that notice of the one-sided clauses was not brought to the attention of the adhering party or that the clauses were in fine print or that the adhering party had no opportunity to bargain?

It has been asserted that to equate signature with consent, when there is no opportunity to bargain and a gross inequality of the parties, is tantamount to creating a juridical relation on the basis of form alone.⁷⁶ Such an effect is reminiscent of the Roman *stipulatio* and is not consistent with the will theory pervading the Code. It is submitted that when the circumstances of a case show that the elements of adhesion are present, the courts ought to look to these circumstances to determine whether consent has been given.

The Civil Code expressly provides for such a judicial determination in the following articles, quoted in pertinent part:

Article 1766: No contract is complete without the consent of both parties

Article 1798: As there must be two parties to every contract, so there must be something proposed by one and accepted and agreed to by another to form the matter of such contract; *the will of both parties must unite on the same point.* (Emphasis added.)

Article 1797: When the parties have the legal capacity to form a contract, the next requisite to its validity is their consent. This being a mere operation of the mind, can have no effect, *unless it be evinced in some manner that shall cause it to be understood by the other parties to the contract.* To prevent error in this essential point, the law establishes, by certain rules adapted to the nature of the contract, *what circumstances shall*

74. LA. CIV. CODE art. 1779.

75. *Id.* art. 1762.

76. *Bolgár* at 57.

be evidence of such consent, and how those circumstances shall be proved; these come within the purview of the law of evidence. (Emphasis added.)

Article 1818: Where the law does not create a legal presumption of consent from certain facts, then, as in the case of other simple presumptions, *it must be left to the discretion of the judge, whether assent is to be implied from them or not.* [Preceding articles creating various presumptions do not create a presumption which would be applicable in adhesion contracts.] (Emphasis added.)

A reading of these articles leads to the conclusion that a Louisiana judge faced with an adhesion contract must look to the nature of the consent of the adherer to determine (1) whether the signature on the written form connotes consent to the entire agreement, (2) whether there has been a true meeting of the minds on all the elements of the agreement, (3) whether under the particular circumstances the adhering party shall be held to a standard of diligence in understanding the terms of the agreement, and (4) whether consent to one-sided clauses has been adequately expressed. To fail to look to each of these elements in order to determine whether consent has been given, by relying merely upon the signature, would be an abdication of the duty of the judge as provided by the Code.

Such an interpretation would not impair the obligation of contracts contrary to the federal Constitution and the laws of the State of Louisiana, because only contracts legally entered into may be enforced, and consent is one of the requisites for legal agreement. Likewise, the maxim that the contract is the law between the parties⁷⁷ would not come into effect until it had been decided that there was in fact a contract based on consent of the parties. Looking directly to the consent issue would permit judges to reach reasonable conclusions without distorting positive provisions as was done in the case of extending the notion of good faith to the *making* of the contract in France and the Netherlands.⁷⁸

Before a determination can be made as to whether or not consent exists, consent must be defined. However, the Code contains no definition of consent. German doctrinal writers have given much thought to this issue and have determined two constituent elements:

77. LA. CIV. CODE art. 1901.

78. The codal provisions refer to the performance of the obligations, not the negotiations prior to making the contract. In order to achieve the desired result, the courts, by judicial interpolation extend the good faith requirement to both non-contractual and pre-contractual relationships.

Abschlussfreiheit or the freedom to enter into the contract, and *Gestaltungsfreiheit* or the power to co-determine the terms.⁷⁹ This analysis goes to the heart of the adhesion contract problem. In an adhesion contract, the adhering party has the freedom to decide whether or not to enter into the contract, but he does not have the power to co-determine the terms.

It is submitted that the concept of contract reflected in the Code (including bargaining and party autonomy) incorporates both of these elements. If this analysis were followed by a judge making a determination of whether assent had been given, he could conclude that there was no consent when the ability to co-determine the terms was lacking.⁸⁰

Jurisprudential Remedies under the Code

The consent approach to adhesion contracts discussed above gives courts a reasonable method for nullifying the entire agreement. An equally valid method of approach to adhesion contracts in Louisiana could be found in the use of the *contra bonos mores* articles.⁸¹ As continental courts apply this doctrine, a contract containing clauses so one-sided that they contravene a society's sense of justice and decency is avoided because it is contrary to good morals.

Louisiana judges could use both of these approaches today to reach just results in cases of adhesion. In looking to the issue of adhesion itself, judges would make great advances in our contracts law. However, neither of these methods really solves the problem of adhesion. They are means by which the courts can relieve a party from an unfair agreement, but there is not the flexibility to reach anything other than an all or nothing solution. Under the Code, there is no conception of partial enforcement. If the contract is valid, all of it is enforced; if it is invalid, none of it may be enforced.

A Modest Proposal

Not every adhesion problem can be justly solved by declaring the contract wholly valid or invalid. In some cases, the best result would be to declare a *clause* invalid thus upholding the essential agreement of the parties while protecting the weaker party from unusually harsh one-sided clauses. Statutes in Italy, a civil law jurisdiction, give spe-

79. *Lenhoff* at 482.

80. The exercise *vel non* of the power to co-determine is not important in determining whether consent exists.

81. LA. CIV. CODE art. 1892; see 1 S. LITVINOFF, OBLIGATIONS § 212 n.34, § 30 (1969).

cific authority to the judge to invalidate clauses of an agreement. It is significant that legislatures which have undertaken the task of correcting the inequality of bargaining power have considered the power to invalidate clauses as essential to proper dispensation of justice. It is submitted that this flexible remedy should be incorporated into the Civil Code.

If an amendment to the Code is called for, what should be the nature of the amendment? The statutes enacted in Italy have the defect of being so specific and form-oriented that they created innumerable problems. A flood of litigation ensued while the courts tried to define the specific requirements of form. In contrast, the broader provisions of the UCC and UCCC have led to more effective results without unnecessary litigation.

The Louisiana statute on unconscionability in consumer credit transactions gives Louisiana courts the necessary flexibility to refuse to enforce a provision of the contract. This statute has the advantage of giving wide discretion to the court while avoiding the complications of strict requirements of form. The disadvantage of R.S. 9:3551 is that it is by its terms limited to consumer credit transactions. Adhesion contracts are not used exclusively in consumer credit transactions; they are pervasive in all transactions. Thus a new codal provision is necessary to increase the scope of the remedy in keeping with the scope of the problem.

Determinations would have to be made as to the diligence required of the adhering party in seeking to understand the terms, the burden on the drafting party in conducting his business, and the public interest in protecting citizens from sharp business practices. These issues would have to be resolved in the light of the facts of each case.

CONCLUSION

Adhesion contracts should be specifically analyzed as a pervasive type of contract in modern society. A unified, conceptual approach to the problems of adhesion provides a better framework for reaching solutions to these problems than a reliance on technical remedies devised for other purposes. The Louisiana Civil Code and La. R.S. 9:3551 contain methods by which courts can seek to remedy the inequalities inherent in adhesion contracts.

A more effective way to treat contracts of adhesion, however, would be to enact a new provision containing both the flexibility of La. R.S. 9:3551 and the scope of a codal article. The new provision should allow for judicial discretion in the treatment of one-sided

clauses rather than specifying strict adherence to form. In this way, the circumstances in each case could be reasonably evaluated to determine the properly applicable remedy.